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DEPARTMENT OF EDUCATION

CFDA Number: 84.368.

[Docket ID ED-2012-OESE-0002]

Proposed revision to selection criteria--Enhanced  
Assessment Instruments

AGENCY: Office of Elementary and Secondary Education,  
Department of Education.

ACTION: Notice.

SUMMARY: The Assistant Secretary for Elementary and Secondary Education proposes to amend the selection criteria under the Enhanced Assessment Instruments Grant program, also called the Enhanced Assessment Grant (EAG) program, as established in the notice of final priorities, requirements, definitions, and selection criteria (2011 NFP). The 2011 NFP established specific priorities, requirements, definitions, and selection criteria that may be used for the EAG program. The changes proposed in this notice would provide the Secretary with additional flexibility with respect to selection criteria for EAG competitions in 2012 that use fiscal year (FY) 2011 funds and for subsequent competitions. We believe that these proposed changes would enable the Department to administer this program more effectively, simplify the application and

review processes, and better ensure that the strongest applications receive EAG funds.

DATES: We must receive your comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- Federal eRulemaking Portal: Go to [www.regulations.gov](http://www.regulations.gov) to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "How To Use This Site"

- Postal Mail, Commercial Delivery, or Hand Delivery. If you mail or deliver your comments about these proposed revisions to selection criteria, address them to Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education (Attention: EAG Comments), U.S. Department of Education, 400 Maryland Avenue, SW., mail stop 6132, Washington, DC 20202-[fill in

last four digits of zip code].

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Collette Roney.

Telephone: (202) 401-5245 or by e-mail:

[Collette.Roney@ed.gov](mailto:Collette.Roney@ed.gov).

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service, toll free, at 1-800-877-8339.

#### SUPPLEMENTARY INFORMATION

Invitation to Comment: We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final revisions to the selection criteria, we urge you to identify clearly the specific proposed revisions your comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed revisions to the selection criteria. Please let us know of any further ways

we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this notice by accessing Regulations.gov. You may also inspect the comments in person, in room 3W226, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Purpose of the Program: The purpose of the EAG program is to enhance the quality of assessment instruments and systems used by States for measuring the academic achievement of elementary and secondary school students.

Program Authority: 20 U.S.C. 7301a.

### Summary of Proposed Changes:

The changes we are proposing in this notice would provide the Secretary the flexibility, in establishing selection criteria used in grant competitions conducted under the EAG program using FY 2011 funds or funds from subsequent years to choose selection criteria and factors -

- (a) from those established in the 2011 NFP for the EAG program, published in the Federal Register on April 19, 2011 (76 FR 21986), (b) from the general selection criteria in the Education Department General Administrative Regulations (EDGAR) in 34 CFR 75.210, (c) based on statutory provisions in accordance with 34 CFR 75.209, or
- (d) from any combination of the selection criteria and factors in paragraphs (a) through (c).

These proposed changes would allow the Department more flexibility to better achieve the program's purposes. Specifically, the Department would have the flexibility to use the most appropriate selection criteria in any year in which this program is in effect, ensuring that the EAG program can be adapted to address the evolving needs of the American education system with respect to the assessments used by States to hold schools and districts accountable for student performance.

### SELECTION CRITERIA

## Background

The 2011 NFP established specific selection criteria for the EAG program that the Department can use to evaluate EAG applications.<sup>1</sup> The Department may apply one or more of these selection criteria in any year in which a competition for program funds is held.

We have concluded that greater flexibility is desirable for choosing selection criteria, and the factors used to determine the degree to which an applicant meets the criteria, in order to enable the Department to align selection criteria with the assessment needs identified by the Department and the priorities established for a given competition. Such flexibility would also allow the Department to simplify the selection criteria, as appropriate, for a particular competition. Accordingly, we are proposing in this notice that, when establishing selection criteria for an EAG competition, the Secretary may choose one or more of the selection criteria and factors-- (a) established for the EAG program in the 2011 NFP, (b) from the general selection criteria in 34 CFR 75.210, (c) based on statutory provisions in accordance with 34 CFR 75.209, or (d) from any combination of these criteria and factors for the purpose of evaluating grant

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<sup>1</sup> See 76 FR 21995-21996 [available at: <http://edocket.access.gpo.gov/2011/pdf/2011-9479.pdf>]

applications under the EAG program.<sup>2</sup>

We believe that the proposed change will enable the Department to administer this program more effectively, simplify the application and review processes, and better ensure that the strongest applications receive EAG funds.

#### Proposed Revision to Selection Criteria

The Assistant Secretary proposes that the Secretary may use one or more of the selection criteria listed in paragraphs (a) through (d) for evaluating an application under this program. This flexibility would include the authority to reduce the number of selection criteria. Within each criterion from these sources, in order to determine the degree to which an applicant meets a criterion, the Secretary would further define each criterion by selecting one or more specific factors within a criterion or assigning factors from one criterion, from any of those sources, to another criterion, in any of those sources. We may apply one or more of these criteria in any

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<sup>2</sup> The Department's regulations in EDGAR govern, among other things, the use of selection criteria to evaluate discretionary grant applications. Under 34 CFR 75.200, the Secretary may use selection criteria based on statutory provisions in accordance with 34 CFR 75.209, selection criteria in program-specific regulations, selection criteria established under 34 CFR 75.210, or any combination of these. The Secretary may select from the menu one or more criteria that best enable the Department to select the highest-quality applications, consistent with the program purpose, statutory requirements, and any priorities established for a competition. For additional information on 34 CFR 75.209 and 34 CFR 75.270, [see](http://www2.ed.gov/policy/fund/reg/edgarReg/edgar.html) <http://www2.ed.gov/policy/fund/reg/edgarReg/edgar.html>.

year in which this program is in effect. In the notice inviting applications or the application package or both we will announce the maximum possible points assigned to each criterion.

(a) The selection criteria established in the 2011 NFP.

(b) The selection criteria in 34 CFR 75.210.

(c) Selection criteria based on the statutory requirements for the EAG program in accordance with 34 CFR 75.209.

(d) Any combination of selection criteria and factors in paragraphs (a) through (c).

#### Final Revisions to Selection Criteria

We will announce the final revisions in a notice in the Federal Register. We will determine the final revisions after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does not solicit applications. In any year in which we choose to use one or more of these selection criteria, we invite applications through a notice



in the Federal Register.<sup>3</sup>

Executive Orders 12866 and 13563:

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of

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<sup>3</sup> Availability of funds for the EAG program for a given year is contingent upon an appropriation of funds for the program by the Congress.

legal mandates, the President's priorities, or the principles stated in the Executive Order.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed this proposed regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are taking this regulatory action only on a reasoned determination that its benefits justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action

would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive Orders, the Department has assessed the potential costs and benefits of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

#### Summary of Potential Costs and Benefits

This proposed regulatory action affects only State educational agencies (SEAs) or consortia of SEAs applying for assistance under the EAG program. It creates flexibility for the Department, with respect to EAG competitions in 2012 for FY 2011 funds and for subsequent competitions, to select from among, or to combine, selection criteria that were established in the 2011 NFP criteria, selection criteria from 34 CFR 75.210, and other selection criteria based on the statute under 34 CFR 75.209. This flexibility would allow the Department to align selection criteria with program needs and ensure that the strongest applications are selected for funding under the program.

We believe that adding this flexibility would not impose a financial burden that SEAs would not otherwise incur in the development and submission of a grant application under the EAG program. In addition, under some circumstances (for example, if the Department elected to use fewer criteria or factors in a given competition), the proposed changes could reduce the financial burden of preparing an EAG grant application by a modest amount. Moreover, the Department expects a small number of applicants, which further serves to mitigate any potential costs.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the program contact person listed under FOR

FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the Federal Register. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is available via the Federal Digital System at:

[www.gpo.gov/fdsys](http://www.gpo.gov/fdsys). At this site you can view this document, as well as all other documents of this Department published in the Federal Register, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the Federal Register by using the article search feature at: [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: January 25, 2012

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Michael Yudin,  
Acting Assistant Secretary for  
Elementary and Secondary Education.

[FR Doc. 2012-1961 Filed 01/27/2012 at 8:45 am; Publication Date: 01/30/2012]